85-1000

No. _____

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

FACER INSURANCE AGENCY, INC.,

Petitioner,

v.

GEORGE FABE, Superintendent of Insurance, State of Ohio, Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike, Delaware, Ohio 43014

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jane H. Henneman
THOMAS, MAMER & HAUGHEY
30 Main St., 5th Floor
P.O. Box 967
Champaign, IL 61820-0967
(217)351-1500
Attorney for Respondent

BEST AVAILABLE COPY

TABLE OF CONTENTS

Subject Index

	Page
Reasons for Denying the Writ	2
Conclusion.....	9

TABLE OF AUTHORITIES

	Page
Ill. Rev. Stat. Ch. 73 §818 (1981).....	2

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

FACER INSURANCE AGENCY, INC.,

Petitioner,

v.

GEORGE FABE, Superintendent of Insurance, State of Ohio, Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike Delaware, Ohio 43014

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent respectfully prays that a writ of certiorari be denied and the judgment and opinion of the Seventh Circuit entered in this proceeding on September 9, 1985 be permitted to stand without review.

REASONS FOR DENYING THE WRIT

No substantial ground for review on writ of certiorari exists. The fact Petitioner disagrees with the decision and its reasoning is not sufficient grounds for review. The various decisions of the Federal Courts of Appeals are not in conflict. The cases reach different results based on different state laws and different factual situations. The relevant Illinois Statute, in particular, is unique (Ill. Rev. Stat. Ch. 73 §818 (1981). Few, if any, other state statutes specifically deny a set off to an insurance agent against his account with a company, for the unearned portion of the premium from a cancelled policy, unless that policy was cancelled prior to the entry of the Order of Liquidation or Rehabilitation, and unless the unearned portion of the

premium on that cancelled policy was refunded to the assured prior to the entry of Order of Liquidation or Rehabilitation. A number of states reached this conclusion based on their common law, but Illinois is unique in codifying this approach.

The decision involves no questions of federal law.

The decision in no way departs from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by a lower court. Petitioner claims the decision overturns a 1960 Seventh Circuit Decision and 1872 and 1874 decisions by the Illinois Supreme Court. Petitioner neglects to mention that these cases predate the relevant Illinois statute, which was adopted in 1967, and which was found by both the Seventh Circuit Court of

Appeals and Distric Court to be controlling. The issues, while obviously important to the litigants, and to others similarly situated; namely insurance agents and the liquidators of insolvent insurers, cannot be said to be of "sweeping public inpact" as Petitioner alleges. The decision in no way affects the rights of policy holders, but only affects the rights of Illinois insurance agents against the liquidator of an insolvent insurer. The right and fair result was reached below. The rule sought by Petitioner would run counter to the whole public policy underlying the Illinois statutory liquidation process for insolvent insurers. This statutory process is designed to achieve an equal sharing by creditors in the insolvent's assets, in proportion to their claims, without permitting preferential

set offs in favor of some agents over other agents and creditors. The rule advocated by Petitioner would in fact enable tardy or defaulting agents to recover more than those agents who promptly collect and pay premiums. The Illinois statute is designed to put all creditors on an equal footing.

In addition, Petitioner is refusing to account to the insurer for the same funds it claimed a refund for, causing the insurer to suffer a double loss. Petitioner filed and was paid claims against the Illinois and Indiana Insurance Guaranty Funds for the same funds it claims it is not liable for to respondent. The Respondent suffers a double loss in that these Guaranty Funds have a claim against it in the context of the liquidation proceedings in Ohio, but they have not received the funds from the Petitioner. Petitioner in fact has

received the funds twice. Also, Petitioner claims the right to keep the profit on cancelled policies. Crediting unearned commissions against replacement premiums simply means that Petitioner did not take a double commission; it collected only one commission instead of two.

Certain essential facts are mistated or omitted by Petitioner which change the nature of the legal issues. Petitioner states that each month, PIC invoiced it for some, but not necessarily all, of the policies written prior to the date of the invoice; and that each month, Facer would pay some, but not necessarily all, of the invoiced charges. This incorrectly implies that PIC only billed and Facer only paid earned or collected premiums. The consistent course of dealing between the parties was that Facer paid PIC the total premiums for

policies it procured when PIC invoiced Facer, regardless of when the premiums had been earned or collected. If Facer paid less than the invoiced amount, it was because the account current did not yet reflect a recent Facer payment. Also, PIC invoiced Facer for premiums when the final policy was issued, although a binder was sometimes issued and the policy effective in an earlier month. This occurred when Facer was late in forwarding a signed application, necessary before the final policy could be issued.

Facer's statement of facts also fails to mention that on July 30, 1981, the liquidator sent Facer a mailgram notice of PIC's insolvency, instructing it to collect and pay all balances due as of July 30, 1981, that no refund of unearned premiums should be paid or credited to any policyholder on

policy transactions occurring on or after July 30th, and that if any agent made such a refund he did so at his own expense. The mailgram specifically advised agents that they would not be allowed to off set premium refunds on policy transactions occurring after July 30th, against balances owed PIC prior to July 30th. Almost immediately Facer began sending cancellation notices to PIC with letters stating "We are applying [the unearned premium] to our account with you." None of the unearned commissions awarded by the Courts are on policies cancelled before entry of the Order of Liquidation. In no case did Facer give the policyholder credit for the unearned commission before July 30th.

CONCLUSION

For the foregoing reasons, no Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Jane H. Henneman

Jane H. Henneman
THOMAS, MAMER & HAUGHEY
30 Main St., 5th Floor
P.O. Box 967
Champaign, IL 61820-0967
(217)351-1500